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In The

Supreme Court of the United States

October Term, 1974

No. 74-316

CHARLES D. KERN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

QUESTIONS PRESENTED

I.

Is The Petitioner's Claim Properly Before This Court?

II.

Did The Trial Court Abuse Its Discretion In Denying Petitioner's Motion To Withdraw His Guilty Plea?

STATEMENT OF THE CASE

Petitioner was indicted on two counts of feloniously possessing controlled drugs with intent to distribute.

On September 7, 1973 a hearing was held on petitioner's motion to suppress certain evidence seized at his home. At this hearing petitioner was represented by Thomas J. Morris, an attorney retained by petitioner. At this hearing petitioner called his wife as a witness in an attempt to establish the invalidity of the seizure (Transcript of 9-7-73, pp. 23-38). During this hearing Mr. Morris advised the trial judge that on the night of the seizure he had had a telephone conversation with petitioner's wife while the police were present. During this conversation Mr. Morris requested the police to get on an extension phone and he advised the police to leave the premises (Transcript of 9-7-73, p. 7). Also at this hearing it was stipulated that Mr. Morris had been called and had advised the police to leave the petitioner's premises (Transcript of 9-7-73, p. 30). After hearing the evidence the court denied petitioner's motion to suppress.

Thereafter on September 11, 1973, petitioner, again represented by Mr. Morris, entered a plea of guilty to one count of possession with intent to distribute, and the Commonwealth nolle prossed the second count (Transcript of 9-11-73, pp. 2-7).

On or about November 9, 1973, petitioner filed a motion to withdraw his guilty plea. This motion was apparently filed by Thomas A. Fortkort, another attorney retained by petitioner. A hearing was held on November 23, 1973, at which time attorney Thomas J. Morris appeared with petitioner, and Mr. Fortkort was not present.

During this hearing Mr. Morris assigned as the reason for allowing petitioner to withdraw his guilty plea the fact that he, Mr. Morris, possessed certain information which he had gained in a telephone conversation with the police at petitioner's home and that this information should have been

produced at the motion to suppress (Transcript of 9-23-73, pp. 6-10). At no point in this hearing did Mr. Morris suggest that his information would have been any different from that which Mrs. Kern had given nor to that which was stipulated at the time of the motion to suppress. At this hearing it was pointed out to the trial court that by accepting petitioner's plea of guilty the Commonwealth had radically changed its position. In reliance upon petitioner's plea of guilty the Commonwealth nolle prossed one count of possession of controlled drugs with intent to distribute (Transcript of 9-23-73, p. 11); certain witnesses of the Commonwealth who were prepared to testify earlier could no longer be counted upon (Transcript of 9-23-73, pp. 13 and 14); and on a separate felony charge petitioner had been allowed to enter a plea of guilty to a misdemeanor (Transcript of 9-23-73, p. 14). Petitioner's motion to withdraw his guilty plea was denied, and petitioner was subsequently sentenced on January 11, 1974.

Petitioner, through attorney Fortkort, filed a petition for appeal in the Virginia Supreme Court, which was denied by order of June 27, 1974.

ARGUMENT AGAINST GRANTING CERTIORARI

I.

Petitioner's Claim Is Not Properly Before This Court.

In the petition for certiorari the petitioner refers to the trial court abusing its discretion by denying petitioner's motion to withdraw his guilty plea, but has framed his argument in terms of ineffective assistance of counsel as a denial of due process of law in violation of the Fifth and Sixth Amendments of the United States Constitution (See Petition for Certiorari, pp. 2, 6, and 8).

In the Supreme Court of Virginia the petitioner's sole

argument on the point now being raised was directed at an abuse of discretion by the trial court. The assignment of error was as follows:

> "The Court committed error in refusing Defendant's request to withdraw his plea of 'guilty' prior to sentencing and prior to the completion of the probation officer's report." (Petition for Appeal, p. iv.)

The question presented to the Virginia Supreme Court was as follows:

> "DOES A COURT ABUSE ITS DISCRETION IN NOT ALLOWING A DEFENDANT TO WITHDRAW HIS PLEA OF GUILTY WHERE THE DEFENDANT INDICATES THAT THERE HAS BEEN SOME MISUNDERSTANDING AS TO THE EFFECT OF HIS PLEA OF GUILTY, AND WHERE THE TRIAL OF THE CASE WOULD IMPOSE NO ADDITIONAL DELAY IN CONCLUDING THE CASE AND WHERE THE COMMONWEALTH HAS MADE NO SHOWING THAT THE WITHDRAWAL OF THE PLEA OF GUILTY WOULD BE PREJUDICIAL TO THE COMMONWEALTH'S CASE?" (Petition for Appeal, p. 11.)

The Virginia Supreme Court has never been called upon to determine the issue being presented to this Court, that is, whether petitioner has been denied the effective assistance of counsel. In petitioner's appeal to the Virginia Supreme Court no due process claim was raised or alluded to nor was either the Fifth or Sixth Amendment ever mentioned. Petitioner is attempting to place before this Court an issue which has never been ruled upon by the Virginia Supreme Court.

It is well established that the United States Supreme Court will not decide Federal constitutional issues raised in the Supreme Court for the first time on review of State court decisions. *Rugendorf* v. *United States,* 376 U.S. 528

(1964); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Hill* v. *California*, 401 U.S. 797 (1971).

II.

The Trial Court Did Not Abuse Its Discretion In Denying Petitioner's Motion To Withdraw His Guilty Plea.

Any request to allow a guilty plea to be withdrawn is directed to the sound discretion of the trial judge. See Rule 3A:25(d), Rules of the Supreme Court of Virginia; Rule 32(d), Federal Rules of Criminal Procedure; *Parris* v. *Commonwealth*, 189 Va. 321 (1949); *United States* v. *Del Valle-Rojas*, 463 F.2d 228 (9th Cir. 1972).

Upon appeal predicated on failure to permit a guilty plea to be withdrawn, the appellant, to have his conviction reversed must prove abuse of discretion by the trial judge. *United States* v. *Rivas*, 477 F.2d 139 (5th Cir. 1973); *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1972); *United States* v. *Benson*, 469 F.2d 222 (8th Cir. 1972); *United States* v. *Webster*, 468 F.2d 769 (9th Cir. 1972), *cert. den.* 410 U.S. 934 (1973); *United States* v. *Tabory*, 462 F.2d 352 (4th Cir. 1972).

In considering whether to grant the request to withdraw a plea of guilty the court must weigh the defendant's reason for withdrawal against the resulting prejudice to the government. *Farnsworth* v. *Sanford*, 115 F.2d 375 (5th Cir. 1940); *United States* v. *Harvey*, 463 F.2d 1022 (4th Cir. 1972), *cert. den.* 411 U.S. 972 (1973); *United States* v. *Del Valle-Rojas, supra.*

In the case at bar there was no showing in the trial court of any plausible or valid reason why petitioner should have been allowed to withdraw his guilty plea. Petitioner's counsel merely suggested that he personally possessed information which should have been presented at the time of the

motion to suppress. No hint was given as to the nature of this information, whether it would have been material, whether it would have been different from the evidence which was presented at the motion to suppress, or whether it would have been different from that which had been stipulated. A trial judge can hardly be asked to allow a withdrawal of the solemn plea in such a vacuum. On the other hand the Commonwealth showed that it had been substantially prejudiced by reliance upon the petitioner's plea. The Commonwealth had nolle prossed one charge, could no longer count on its witnesses, and petitioner had been allowed to plea to a misdemeanor on yet another felony charge. Certainly under these circumstances the trial court did not abuse its discretion in not permitting the guilty plea to be withdrawn.

CONCLUSION

It is respectfully submitted that petitioner's claim has never been presented in the same context to the Supreme Court of Virginia, and consequently is not properly before this Court. It is further submitted that the trial court did not abuse its discretion in not permitting the withdrawal of the guilty plea.

Wherefore, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 12th day of December, 1974, I mailed three copies of the foregoing Brief in Opposition to Albert J. Ahern, Jr., 5205 Leesburg Pike, Baileys Crossroads, Virginia 22041, counsel of record for petitioner.

JAMES E. KULP
Assistant Attorney General